



POLICE DEPARTMENT

October 27, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Frank Dileo
Tax Registry No. 918947
72 Precinct
Disciplinary Case No. 2013-10277

Detective Justin Cracchiola
Tax Registry No. 925131
67 Detective Squad
Disciplinary Case No. 2013-10275

The above-named members of the Department appeared before the Court on July 28, 2015, charged with the following:

Disciplinary Case No. 2013-10277

1. Said Police Officer Frank Dileo, on or about September 26, 2012, at approximately 1600 hours, while assigned to 72nd PCT and on duty, in the vicinity of the [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a vehicle driven by Bayan Jaber, without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

Disciplinary Case No. 2013-10275

1. Said Police Officer Justin Cracchiola, on or about September 26, 2012, at approximately 1600 hours, while assigned to 72nd PCT and on duty, in the vicinity of the [REDACTED], Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a vehicle driven by Bayan Jaber, without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED CONDUCT

2. Said Police Officer Justin Cracchiola, on or about September 26, 2012, at approximately 1600 hours, while assigned to 72nd PCT and on duty, in the vicinity of the [REDACTED] [REDACTED], Kings County, was disrespectful in that he made remarks regarding Bayan Jaber's race, without police necessity, by asking in sum and substance: WHAT IS YOUR RACE, WHAT IS YOUR COUSIN'S RACE, and HOW ARE YOU RELATED IF YOU ARE PALESTINIAN AND HE IS PUERTO RICAN.

P.G. 203-09, Page 1, Paragraph 2 PUBLIC CONTACT – GENERAL

The Civilian Complaint Review Board (CCRB) was represented by Vanessa McEvoy, Esq. Respondents were represented by John P. Tynan, Esq., Worth, Longworth & London LLP.

Respondents pleaded Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Having considered the testimony, the evidence presented and the arguments set forth by counsel, this tribunal finds that the preponderance of the credible evidence supports a finding that Respondents searched Bayan Jaber's vehicle without sufficient authority. The evidence does not, however, support a conclusion that Respondent Cracchiola made remarks to her about race that were disrespectful or without police necessity. Respondents thus are found Guilty of Specification No. 1 against each of them. Respondent Cracchiola is found Not Guilty of Specification No. 2.

FINDINGS AND ANALYSIS

The following is a summary of the undisputed facts. On September 26, 2012, Respondents were partners and assigned to the 72 Precinct Street Narcotics Enforcement Unit (SNEU). They were working in plainclothes and driving an unmarked vehicle and conducting

observations for drug-related activity in the area. They were in the vicinity of [REDACTED]

[REDACTED] (Tr. 80-81, 86-94, 119-21).

Bayan Jaber was in her 20s and resided with her mother and high-school-aged cousin, Minor A, on [REDACTED] within the confines of the [REDACTED] Precinct. At some time before 1600 hours, Jaber left her house to pick her mother up from work, and also took her laundry bag with her as she was going to stop at the laundromat on her way back. Jaber was driving her mother's 2011 BMW X6. Jaber asked Minor A to help her with the bag because it was too heavy for her to lift by herself. Minor A had just returned from a run on the pier and was not wearing a shirt. Minor A asked Jaber to drop him off at the corner store, but before they got to the store, he got out to talk to a pretty girl. Jaber continued driving but was pulled over shortly afterward (Tr. 12, 14-16).

Jaber claims that Respondents stopped her vehicle, that they searched the vehicle, and that offensive language was used concerning her and her cousin's ethnicity. Respondents did not so much dispute that Jaber's car was searched or that an officer made remarks toward her.

Rather, they disputed that they were in fact the officers involved.

Case No. 2013-10275: Specification No. 1

Case No. 2013-10277: Specification No. 1

Respondents are charged with searching Jaber's vehicle without sufficient legal authority. Respondents and Jaber offered significantly different versions of the event. In fact, Respondents adamantly denied ever having any sort of interaction with Jaber at all. Jaber, on the other hand, gave a very detailed account of her encounter with Respondents. Accordingly, it is left to this tribunal to determine which version of the incident is supported by the preponderance of the credible evidence. Having carefully weighed all of the relevant testimony, and considered

various factors that speak to the credibility of Jaber and Respondents, this tribunal finds Jaber to be more credible than Respondents.

Jaber testified that shortly before 1600 hours, she was pulled over by two police officers in plainclothes, both six feet tall and heavy, on [REDACTED] Both officers were white males, wearing jeans and T-shirts, and displaying shields. They were driving a green vehicle that had a dashboard plaque from the Mexicana livery cab company, a local firm Jaber recognized. She identified Respondent Cracchiola as the officer who interacted with her. When Jaber was asked for her driver's license, she could not provide it because she thought she had left her purse at home. But she had brought it, in fact, and Respondent Cracchiola saw it in the back seat of the car and asked Jaber to step out. Respondent Cracchiola unzipped the purse, removed a wallet, sniffed the wallet, and asked for her identification (Tr. 13, 18-20, 22-27, 55-56, 58, 63, 67).

Respondent Cracchiola asked Jaber if she had drugs in the car and then told her to step to the side. He opened her driver side door and got into the car. Respondent Cracchiola asked Respondent Dileo to open the trunk of the car. Respondent Dileo removed the bag and dumped it in front of the trunk. Respondents began sifting through her clothes. After sifting through her clothes, Respondent Cracchiola went into the driver side of the vehicle and opened the center console and appeared to reach for the glove compartment. Respondent Dileo repacked the laundry into the bag. Respondent Dileo then went into the back seat of the vehicle (Tr. 32-33).

Jaber further testified that Respondent Cracchiola told her, "We know you have drugs in the car, and I'm going to find them, and if I find them, I'm going to impound your \$90,000 BMW." Respondent Cracchiola asked her about the drugs in her car about five or six times.

After Respondents finished, however, Respondent Cracchiola apologized and said "your cousin gave me a funny look . . . he had thrown something" (Tr. 33-35).

Jaber's testimony was straightforward and presented with a very detailed account of the search. She did not have a financial motive in this case as there was no evidence that she had a civil action against the Department. Although she no longer was a New York City resident and travelled from suburban Detroit to testify at this trial, there was no evidence that she had an unfounded bias toward Respondents and there was no evidence of a prior acrimonious relationship or encounter.

Jaber displayed a lack of knowledge concerning law enforcement matters. For example, she thought that Respondent Cracchiola's remark about Minor A having thrown something was a concern about litter (as opposed to disposal or stashing of drug evidence), and opined on what was and was not "part of" a vehicle stop (Tr. 34-35, 70). This actually lent credence to her account because it suggested a lack of desire to embellish details. The Court credits her testimony that Respondents pulled over and searched her car.

On the other hand, Respondents' denial of having any sort of interaction with Jaber was lacking in candor. For instance, Jaber was pulled over on [REDACTED]. This was in the immediate vicinity of where Respondents were assigned for the day, as according to Respondent Dileo they were set up on [REDACTED]. Their first arrest was sometime before 1310 hours, as that was when his memo book indicated he resumed patrol. Around 1610 they made a narcotics-related arrest at [REDACTED]. Respondent Cracchiola testified that they made two arrests that day, the first at 1355 hours at a gas station on [REDACTED], and the second at 1615. From 1600 to 1615 hours, he said, Respondents were parked at a fire hydrant observing a car that was parked at another hydrant.

Respondent Cracchiola did not specify where this hydrant was, but did say that the second arrest took place at [REDACTED] (Tr. 80-82, 96, 122, 124-27). Thus Respondents placed themselves in the general vicinity of the incident around 1600 hours, when Jaber was pulled over.

Jaber's credible account of the incident was also consistent with activity of a Street Narcotics Enforcement Unit. The undisputed scenario – a person driving in an area targeted for drug enforcement, an individual without a shirt getting out of the car in the middle of the block for no apparent reason and possibly dropping a small object, officers getting suspicious of a driver so confused and apprehensive that she did not realize her purse was in the back seat, or that there had been another individual in the car moments before – is consistent with officers seeking to interdict narcotics activity. Respondents were assigned to the 72 Precinct SNEU, and Jaber credibly testified that Respondent Cracchiola told her that the officers were looking for drugs in the car. While it is true that other law enforcement entities could have been operating in the area, the interaction described by Jaber is one that SNEU officers like Respondents would have undertaken. It is inconsistent with, for example, an auto-larceny or vice investigation.

This tribunal does not credit Respondents' argument that they did not search Jaber's vehicle because it is not documented in their Activity Logs (Tr. 94-95, 121, 129, 131). It is not necessarily the case that every SNEU officer will always make a timely log entry even when required, like an arrest. Respondent Dileo, in fact, apparently did not make a direct entry about the first arrest, noting only his return to patrol.

Respondents' counsel also argued that the CCRB contacted Jaber about a year after this incident to identify the officers, and therefore her identification of Respondents was too far attenuated from the date of the incident. While it is true that the identification procedure was

conducted about a year after the incident, the record demonstrates that Jaber's identification was accurate.

On September 18, 2013, the CCRB emailed Jaber two color photo arrays, one for each Respondent (CCRB Exhibit 3). The arrays each contained Respondents and five fillers, not other members of the SNEU team. Jaber was not able to identify Respondent Dileo but she was able identify Respondent Cracchiola based on his distinct blue eyes. Jaber testified, "I will never forget his eyes. He has nice blue eyes, and I remember staring into them and being, like, that's all I could look at during the entire thing." Jaber circled Respondent Cracchiola's picture in the photo array and wrote a note identifying him. She then sent it back to the CCRB (Tr. 7-8, 36-38, 40-45, 51-52; CCRBX 2, black-and-white copy of photo array printed out by Jaber with note identifying Respondent Cracchiola; CCRBX 1, email from Jaber to CCRB with similar note).

The Court also made an observation of Respondent Cracchiola's eyes from the bench to the witness stand (Tr. 136). There is no question that he has bright and striking blue eyes. Jaber's specific recollection of Respondent Cracchiola's distinct blue eyes and her immediate recognition of them in the photo array is a critical and dispositive factor in crediting her identification.

Moreover, because it was undisputed that Respondents were partners that day, it is more likely than not that he participated in the search as described by Jaber in her testimony above. Jaber testified that Respondent Dileo went into the trunk at his partner's direction and opened her laundry bag. He also entered the back seat. Jaber accurately recalled that Respondent Dileo had noticeable tattoos. Respondent Dileo conceded that his body was heavily tattooed, including on his forearms, which would be visible on a short-sleeve shirt (Tr. 48, 85-86).

Jaber explained that she could not identify Respondent Dileo from the photo array because he had been wearing sunglasses during the encounter. Her candid inability to identify Respondent Dileo, but immediate identification of Respondent Cracchiola, also underscores her accurate recollection of the incident and her desire to tell the truth under oath.

Jaber stated that the unmarked vehicle Respondents were driving was a light green Lincoln Town Car or Ford Crown Victoria. Both of these vehicles are consistent with livery cab service, and Jaber testified that the vehicle had a placard from a local cab company. It was, however, confirmed at trial from the Fleet Services Division that the vehicle was in fact a black Crown Victoria. On the other hand, Respondent Dileo described the car as metallic blue, darker than the sky but lighter than an NYPD police officer uniform. Respondent Cracchiola described it as the blue of the NYPD flag, similar to that of the American flag (Tr. 55-56, 90-91, 133-34). Thus, the issue of the car's color essentially was a push and did not lend credibility to either side. Viewed as a whole, though, Jaber accurately recalled the general type of vehicle, a Town Car or Crown Victoria. Her testimony, as noted above, revealed her to be generally unfamiliar with police practice, so she would not necessarily be expected to know that unmarked Department vehicles often are akin to livery cabs.

The general rule is that probable cause is required to search a vehicle. See People v. Langen, 60 N.Y.2d 170, 180-81 (1983). There was no assertion that anything Jaber did or said established probable cause. Thus, the preponderance of the credible evidence supports a finding that Respondents searched her vehicle without sufficient legal authority. Accordingly, Respondents are found Guilty.

Case No. 2013-10275 Specification No. 2

Jaber testified that she was Palestinian. Minor A's father – the brother of Jaber's mother – also was Palestinian but Minor A's mother was Puerto Rican. Minor A had darker skin than Jaber; in fact, "we do not look related at all" (Tr. 70-71).

Jaber testified that while standing outside of her car, Respondent Cracchiola inquired about the other individual who had been in the car with her. After first denying that anyone had been in the car and heightening the officers' suspicion further, she realized they were talking about Minor A and told them he was her cousin. "That's your cousin?," Respondent Cracchiola exclaimed. "What's your nationality?" She told him that she was Palestinian and that Minor A was Puerto Rican. When he asked how they were related, she explained further (Tr. 28-29, 69-71). Jaber could not give a straight answer to the tribunal's query of whether the officer simply asked how they were related or if he asked how they could possibly be related if one of them was Palestinian and one was Puerto Rican.


Viewed in a light most favorable to the prosecution, the CCRB failed to prove that any remarks made by Respondent Cracchiola were disrespectful or made with a lack of police necessity. By her own admission, Jaber already had made two untrue statements to the officer: that she did not have her ID with her and that no one else had been in the vehicle. Now the officers were faced with her telling them that the other individual was her cousin. But as Jaber testified, Minor A was darker than her and they looked nothing alike. This explains Respondent Cracchiola's incredulity: "That's your cousin?" The CCRB failed to prove that the remarks were disrespectful. If anything, they were to test the probity of Jaber's statement that they were cousins. Once she explained their relation, the officers apparently were satisfied and they moved on. Because the CCRB failed to prove the charge, Respondent Cracchiola is found Not Guilty.

PENALTY

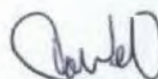
In order to determine an appropriate penalty, Respondents' service records were examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent Cracchiola was appointed to the Department on March 1, 2000, and Respondent Dileo on April 15, 1997. Information from their personnel folders that was considered in making these penalty recommendations is contained in the attached confidential memoranda.

The CCRB recommended a penalty of five vacation days for the improper search of Jaber's vehicle. This is consistent with recent cases. See Case No. 2013-10071 (Feb. 19, 2015) (13-year police officer with no prior disciplinary record forfeited five vacation days for searching complainant's vehicle without sufficient legal authority); see also Case Nos. 2013-11066 & -67 (Sept. 2, 2015) (14-year police officer with two prior adjudications forfeited five days for searching vehicle without sufficient legal authority, as well as discourteous language). Thus, the tribunal recommends that each Respondent forfeit five vacation days.

APPROVED

JAN 07 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

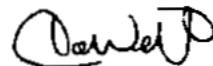
From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE JUSTIN CRACCHIOLA
TAX REGISTRY NO. 925131
DISCIPLINARY CASE NO. 2013-10275

Respondent Cracchiola's last three annual evaluations were as follows: he received an overall rating of 4.0 "Highly Competent" in 2015, a 3.5 "Highly Competent/Competent" in 2014, and a 4.0 "Highly Competent" in 2013. [REDACTED]

[REDACTED] He has four medals for Excellent Police Duty and three medals for Meritorious Police Duty.

From November 2008 to December 2009, Respondent Cracchiola was placed on Level 1 disciplinary monitoring for having three or more CCRB complaints in a one-year period. He has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER FRANK DILEO
TAX REGISTRY NO. 918947
DISCIPLINARY CASE NO. 2013-10277

Respondent Dileo's last three annual evaluations were as follows: he received an overall rating of 4.0 "Highly Competent" in 2014 and 2013, and a 4.5 "Highly/Extremely Competent" in 2012.

He has seven medals for Excellent Police Duty.

Respondent Dileo has no prior formal disciplinary record.

For your consideration.



David S. Weisel
Assistant Deputy Commissioner – Trials